COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

The Berkshire Gas Company	)))	D.T.E. 03-11

RESPONSE OF THE BERKSHIRE GAS COMPANY TO ATTORNEY GENERAL'S MOTION FOR RECONSIDERATION AND MOTION FOR EXTENSION OF JUDICIAL APPEAL PERIOD

The Berkshire Gas Company ("Berkshire" or the "Company") hereby responds to the Attorney General's Motion for Reconsideration and Motion for Extension of Judicial Appeal Period dated October 20, 2003 and filed in this docket and states the following:

1. Consistent with the requirements of the Guidelines established pursuant to Service Quality Standards for Electric Distribution Companies and Local Gas Distribution Companies, D.T.E. 98-84 (2001), on March 3, 2003 Berkshire submitted its Service Quality Report for Calendar Year 2002 ("2002 SQ Report") to the Department.[1]

2. Berkshire's 2002 SQ Report demonstrated that Berkshire had "satisfied all benchmarks for penalty-related service quality benchmarks in 2002" and, accordingly, was not subject to any penalty established by the Department.[2] In addition, the Company reported that it had enhanced its performance in areas where the Company

[1] The 2002 SQ Report was submitted in a form consistent with the requirements established within a Memorandum of the Department's Hearing Officers dated February 6, 2003. This memorandum was provided to all Massachusetts gas and electric distribution companies.

[2] The Guidelines had established seven measures where a penalty could be imposed based upon performance in a given year. Potential penalties were established for response time for odor calls, telephone answering rate, service appointments met, on-cycle meter reading, Department Consumer Division cases, billing adjustments and lost work-time accident rates. Other than for odor call response (for which a 95% response standard was established), the Department required that a gas or electric company have at least three years of data prior to establishing a company-specific penalty benchmark.

had not yet developed three years of data in order to establish a penalty standard. In sum, the Company's report "demonstrate[d] that Berkshire continues to provide high quality service."

3. In a notice in this proceeding, dated March 12, 2003, the Department clearly articulated the manner in which the 2002 SQ Report would be reviewed. Specifically, the Department stated that it would accept written comments on the Company's report through March 26, 2003. A similar process was followed with respect to 2001 reports.

4. In a letter dated March 26, 2003, the Attorney General of the Commonwealth (the "Attorney General") submitted generic comments in this proceeding as well as similar dockets established for the consideration of other utility service quality reports. The Attorney General's comments acknowledged that the Department had not indicated any intention to conduct hearings and intended "solely" to solicit comments from interested parties. AG Comments, p. 2. The Attorney General encouraged the Department to conduct an investigation, including an opportunity for discovery "to obtain underlying data, supporting documentation and an understanding of the conditions under which each company operated during the year." Id. The Attorney General concluded that "only then can the Department determine whether the statistics presented by a company are collected and presented consistently with the Department's orders." Id. The Attorney General also offered several substantive suggestions largely relating to format and presentation. Id.

5. In fact, consistent with the Attorney General's own standard for adequacy in terms of reviewing the 2002 SQ Report, substantial discovery was issued and

responded to by the Company. The Department issued three sets of information requests and the Attorney General issued two sets of information requests. Importantly, the Attorney General's entire second set of information requests was devoted to a "reporting" standard (i.e., a standard for which the Guidelines mandate data reporting), namely staffing levels, which, in turn, is the subject of the Attorney General's Motion for Reconsideration. The Company provided full and complete responses to all of the information requests of the Department and the Attorney General. The Company's responses included voluminous documentation of the Company's strong performance in terms of service quality.[3]

6. On September 30, 2003, the Department issued a letter in this docket and the other dockets established to consider utility service quality reports. The Department expressly found "based on a review of their SQ reports <u>and responses to discovery</u>," that Berkshire (and five other distribution companies) "provided service quality consistent with the Guidelines and their SQ plans" (emphasis added). Department Letter 9/30/03, p. 4.

7. On October 20, 2003, the Attorney General filed a Motion for Reconsideration and a related Motion for Extension of Judicial Appeal Period. The Attorney General's Motion for Reconsideration fails to satisfy the relevant standards for reconsideration and then, belatedly and improperly, seeks to introduce "evidence" after the Department's decision as a part of its inappropriate attempt to have the Department

[3] Several examples of the Company's superior performance are in order. Calendar year 2002 was the second consecutive year in which <u>no</u> residential billing adjustments were necessary for Berkshire. 2002 SQ Report, p. I-1. In 2002 the Company responded to 99.93% of odor calls in less than one hour (1,424 out of 1,425). <u>Id</u>. at III-7. The Department's standard is 95%. The sole call missed was in December, a month with adverse weather.

re-open this completed docket for unnecessary additional proceedings.[4] The Department's regulations provide that a party may file a motion for reconsideration within twenty days of service of a final Department Order. 220 C.M.R. §1.11(10). The Department has noted that its policy in reviewing motions for reconsideration is "well settled." "Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that [the Department] take a fresh look at the record for the express purpose of substantially modifying a decision reached after review and deliberation." North Attleboro Gas Company, D.P.U. 94-130-B, p. 2 (1995); Boston Edison Company, D.P.U. 90-270-A, pp. 2-3(1991). The Department has also held that a motion for reconsideration should "not attempt to reargue issues considered and decided in the main case." Commonwealth Electric Company, D.P.U. 92-3C-1A, pp. 3-6 (1995); Boston Edison, D.P.U. 90-270-A, p.3. The Department has denied motions for reconsideration "when the request rests on an issue or updated information presented for the first time in the motion for reconsideration." Western Massachusetts Electric Company, D.P.U. 85-270-C, pp. 18-20 (1987).

8. The Attorney General's Motion for Reconsideration suggests that the Company has somehow failed to conform with the requirements of G.L. c. 164, § 1 with respect to staffing levels. Section 1E provides that:

> In complying with the service quality standards and employee benchmarks established pursuant to this section, a distribution, transmission or gas company that makes a performance based rate filing after the effective date of this act shall not be allowed to engage in labor displacement or reductions below staffing levels in existence on November 1,

[4] Motions to present additional evidence" are permissible "prior to the rendering of a decision" upon "motion and showing of good cause." 220 C.M.R. §1.10 (8). Here the Attorney General's Motion came after the rendering of a decision and, in addition, without any showing of good cause. See, infra.

> 1997, unless such are part of a collective bargaining agreement or agreements between such company and the applicable organization or organizations representing such organizations, or with the approval of the department following an evidentiary hearing at which the burden shall be upon the company to demonstrate that such staffing reductions shall not adversely disrupt service quality standards as established by the department herein.

The Attorney General suggests as a basis for its Motion for Reconsideration that there is somehow now a “dispute of material fact” regarding the Company’s compliance with Section 1E’s requirements. This “dispute” is created for the first time based solely upon the Attorney General’s late and procedurally flawed Motion for Reconsideration.

9. As noted above, the Department’s September 30, 2003 letter based its findings relating to Berkshire’s 2002 SQ Report on the report itself <u>and</u> “responses to discovery.” Thus, the Department’s review and deliberation was expressly based upon the Company’s response to information requests, including the Company’s response to the Attorney General’s second set of information requests that comprehensively addressed Berkshire’s compliance with the requirements of G.L. c. 164, §1E. Staffing levels were clearly placed in issue by the Attorney General himself prior to the Department’s decision in this docket. Given the Department’s decision to review the filing based upon comments and discovery, the issuance of information requests had a <u>notice</u> effect akin to cross-examination. <u>New England Telephone and Telegraph Company</u>, D.P.U. 86-33-D, p. 9 (1987) (Cross-examination provides adequate notice of an issue being raised).

10. In fact, Berkshire’s responses to the Attorney General’s second set of information requests provide substantial and compelling evidence of Berkshire’s compliance with the relevant staffing requirements. See Appendix A hereto. There was

no evidence to the contrary in the record in this docket, despite the Attorney General's participation and prior submission of comments.[5] Accordingly, the Department's decision necessarily seems based on the Company's compelling evidence of full compliance with the staffing requirements of Section 1E. The Attorney General's Motion for Reconsideration is merely an inappropriate attempt to modify a decision reached after review and deliberation. See North Attleboro, D.P.U., 94-130-B, p. 2. The Department should find that the Attorney General's late and unconvincing arguments do not satisfy the standards for a motion for reconsideration, the only proper post-decision remedy. The Motion is merely an attempt to "reargue issues considered and denied in the main case." Accordingly, the Department should deny the Attorney General's Motion for Reconsideration.

11. The Attorney General apparently recognizes this failure and seeks to improperly submit additional "evidence." The Attorney General's purported "evidence" consists of two general categories of items. The first is a series of letters from members of the General Court expressing concern with respect to the ongoing strike by Berkshire's collective bargaining unit and a general concern that the staffing level requirements of G.L. c. 164, § 1E be satisfied. As an initial matter, Berkshire concurs with both of these sentiments. Berkshire looks forward to the resolution of the strike

[5] Interestingly, the Attorney General was fully aware of the Company's utility staffing levels from his active intervention in Berkshire's recent base rate proceeding. The Company's analysis provided for the inclusion in rates of the costs of 59.09 union employees in utility rates. This proposal was not challenged by the Attorney General. See The Berkshire Gas Company, D.T.E. 01-56 (2002); The Berkshire Gas Company, D.T.E. 01-56-A, pp. 23-25 (describing salary and benefit allocation factors). The Department established the Company's base rates relying upon such calculation. To now suggest that the Company's utility operations require additional union employees is inconsistent with established precedent. See Boston Gas Company v. Department of Pub. Utils., 367 Mass. 92 (1975) ("A party to a proceeding before a regulatory agency such as the [Department] has a right to expect and obtain reasoned consistency in the agency's decisions.").

and is disappointed that its union rejected what Berkshire believed to be an attractive and competitive compensation and benefit proposal. Berkshire will not, however, negotiate in this proceeding or any public forum. Further, Berkshire recognizes and acknowledges the importance of compliance with all requirements of the General Laws and submits that the record in this proceeding confirms that Berkshire has fully complied with the requirements of G.L. c. 164, § 1E. The second category of purported evidence is an affidavit from the President of Berkshire's union apparently seeking to provide a legal opinion from an individual not established as an expert in the law. This "evidence" purports to interpret the terms of the Company's collective bargaining agreement.[6]

12. The "procedure" applied to "introduce" the Attorney General's "evidence" is similarly flawed. The Department's rules provide that "no person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. §1.11(8). This remedy is limited to the time "prior to the rendering of a decision." Id. Even assuming the availability of this remedy, the Attorney General has failed to follow Department procedure and standards it has insisted be followed by other parties. The Attorney General, in fact, raised this very concern recently arguing that except for routine updates of information already provided on the record in a rate case, a motion to reopen must be filed and granted <u>before</u> the testimony and exhibits are "thrust upon the trier of fact," noting that "one cannot un-ring a bell." <u>Boston Gas Company</u>, D.P.U. 88-67 (Phase II), p. 7 (1989). <u>See</u> Motion of the Attorney General to Strike Portions of the

[6] The record contains far better evidence. The most recent collective bargaining agreement was, in fact, included in the Company's response to Information Request AG-2-7. As noted, the Department's letter stated that it had based its decision upon a consideration of discovery responses submitted in this docket.

Initial Brief of Boston Gas Company, D.T.E. 03-40, September 18, 2003. Indeed, the very case cited by the Attorney General describes the proper procedure, namely "the moving party [is] to submit a motion which states the subject or issue that the preferred exhibit or testimony would address." Blackstone Gas Company, D.T.E. 01-50, p. 16 (2001) citing Boston Gas, D.P.U. 88-67. The Department has made it clear that "only if the motion is granted, is it then proper to present the exhibit or testimony itself (emphasis added)." Accordingly, the Department should deny the Attorney General's motion to reopen the docket.

13. The Department should also deny the Attorney General's motion to extend the appeal period. With respect to the motions to extend the judicial appeal period, G.L. c. 25, § 5 provides, in pertinent part, that an appeal of a Department final order must be filed with the Department no later than 20 days after service of the order "or within such further time as the Commission may allow upon request filed prior to the expiration if the twenty days after the date of services of said . . . decision or ruling." See also 220 C.M.R. § 1.11(11). The 20-day appeal deadline indicates a clear intention on the part of the General Court and the Department to ensure that the decision of an aggrieved party to appeal a final order of the Department be made expeditiously. Swift judicial review benefits both the appealing party and other parties, and serves the public interest by promoting the finality of Department orders. Nunnally, D.P.U. 92-34-A at 4 (1993).

The Department's procedural rules state that reasonable extension of the appeal period shall be granted upon a showing of good cause. 220 C.M.R. § 1.11(11). The filing of a contemporaneous motion for reconsideration does not, by itself, constitute good cause for an extension of the appeal period. See New England Telephone, D.T.E.

93-125-A at 14 (1994). The Department should find that the Attorney General has failed to show good cause for the requested extension of the appeal period.[7]

CONCLUSION

Accordingly, for all the reasons stated herein and consistent with well-established Department precedent, The Berkshire Gas Company respectfully submits that the Department should deny the Attorney General's Motion for Reconsideration and Motion for Extension of Judicial Appeal Period.

Respectfully submitted,

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[7] Alternatively, the Department should allow a short time to any appeal. See The Berkshire Gas Company, D.T.E. 01-56-A, pp. 3-4 (2002).

APPENDIX A

TO

RESPONSE OF THE BERKSHIRE GAS
COMPANY TO ATTORNEY GENERAL'S
MOTION FOR RECONSIDERATION AND
MOTION FOR EXTENSION OF JUDICIAL APPEAL PERIOD

SUMMARY OF COMPLIANCE OF

THE BERKSHIRE GAS COMPANY

A. OVERVIEW

The staffing level requirements of Section 1E of Chapter 164 of the General Laws were not applicable to Berkshire until, at the earliest, July 17, 2001, the date of Berkshire's filing of its performance-based rate plan in docket D.T.E. 01-56. No party has challenged this clear statutory threshold. Berkshire has fully complied with such requirement since that date because its "utility" union staffing levels are now higher than in November 1997 as well as higher than the levels reflected in utility rates established in early 2002. This factor alone should end any further inquiry into the matter of Berkshire's full compliance with Section 1E. In any event, any union staffing changes made by Berkshire have been made pursuant to the Company's collective bargaining agreement (including the most recent agreement negotiated after the enactment of Section 1E). Still further, Berkshire has secured Department approval of certain corporate restructuring associated with the "separation" of non-utility functions. In sum, each of these factors demonstrate Berkshire's full compliance with Section 1E.

B. <u>BERKSHIRE HAS INCREASED UNION EMPLOYMENT FOR ITS REGULATED UTILITY OPERATIONS</u>

Berkshire employees have traditionally been responsible for regulated utility and non-utility functions. Salary and benefit costs have long been allocated between functions pursuant to well-established Department precedent and only the portion of such costs attributable to the utility function based upon actual time spent are reflected in Berkshire's utility rates approved by the Department of Telecommunications and Energy. See, e.g. Berkshire Gas Company, D.P.U. 90-121, p. 59 (1990). Indeed, the evidence presented and accepted in the Company's recent base rate case was that 17.78 of compensation expense was attributable to "non-utility" operations and, therefore, not reflected in utility rates. The Berkshire Gas Company, D.T.E. 01-56, pp. 63-64 (2002). Berkshire's union staffing levels and the portion of such staff properly allocated to the utility function at several relevant dates are shown below:

	Total Union Employees	Employees/Regulatory Work
November 1997	71	59.51
2001 Rate Case Test Year	69	59.09
July 2003	63	63

Source: Response to Information Request AG-2-1.

Thus, as a practical matter, the Company's union regulated employment levels as reflected in the record in D.T.E. 03-11 were higher in 2003 than in November 1997, the relevant date cited in Section 1E in terms of the "staffing" benchmark compliance. Further, actual 2003 union utility staffing level was also higher than the portion of union staffing properly attributable to the utility function for inclusion in rates. These record facts alone support the Department's finding that Berkshire was in compliance with the

Department's service quality Guidelines and Berkshire's assertion that it is in full compliance with the requirements of Section 1E.

C. BERKSHIRE'S COLLECTIVE BARGAINING AGREEMENT AUTHORIZES STAFF RESTRUCTURING

Berkshire's collective bargaining agreement provided full support for the exercise of appropriate management discretion with respect to restructuring its labor force. In the Motion for Reconsideration, the Attorney General argues that "staffing levels below 1997 are permissible. . . if authorized by a collective bargaining agreement . . . ." AG Motion to Reconsideration, p. 2. The Company does not disagree with this statement and notes that the actual collective bargaining agreement in effect through March 2003 provided in response to Information Request AG-2-7 expressly provides for staff restructuring, including staff reductions.

As an initial matter, it is significant that the Company has not "laid off" any employees, union or otherwise, for at least 30 years. Information Request AG-2-8. Rather, Berkshire has relied upon reassignments, cross-training and attrition when necessary to restructure its work force. Id. Nevertheless, the Company has long recognized its public service obligation to customers to provide reliable and safe service at the least cost. Accordingly, Berkshire has sought to retain appropriate management discretion to restructure its workforce consistent with its public service obligations.

Article IX of the most recent collective bargaining agreement retained for the Company the authority necessary to support any staff reductions of the Company. Article IX, entitled "Company Management" provides that:

> Except as limited by the specific provisions of this Agreement, the Company reserves and retains for itself exclusively, all of the rights, privileges and authority to

> manage, operate and to direct the management and operation of its affairs, <u>including, but not limited to</u>, the right to employ, promote, or discharge for cause, the right to assign work, the right to direct working forces, to temporarily transfer employees and to lay off employees because of lack of work. The Union agrees that except insofar as it is granted the right and authority hereunder, it will not hinder or interfere with the management of the Company's affairs. (emphasis added).

Information Request AG-2-7 and attached collective bargaining agreement dated as of April 1, 2000. This agreement, negotiated <u>after</u> the enactment of Section 1E, reserves substantial discretion to Berkshire's management and binds the Union not to interfere with such management affairs. The Attorney General's attempt to refute the substantial discretion negotiated into the agreement fails. The Attorney General's Motion for Reconsideration (p. 2) acknowledges the Company's authority to lay off workers, but then strains (without authority and contrary to the agreement's plain intention to not "limit" this provision by reference to examples) to claim that authority to make lay offs does somehow not extend to "permanent" staffing changes. This interpretation is contrary to the plain intent of the parties and can only be supported by a selective reading of the agreement. Article VII, Section 1(c), in fact, demonstrates that the Attorney General's interpretation is flawed as it describes specific procedures that the Company will follow with respect to seniority in "cases of demotion, lay off for lack of work, <u>reduction in the work force</u> or the elimination of a job." The contract expressly provides for procedures in case the Company elects to exercise its right to reduce the work force as expressly distinguished from layoffs. In sum, the Attorney General's argument can only be accepted if the plain language of the collective bargaining agreement is ignored.

The Attorney General's last argument seems to be that, despite this and other specific reservations of management authority, Section 1E was somehow violated because the collective bargaining agreement did not include some specific verbiage referencing the staffing benchmark. See Motion for Reconsideration, Attachment 1 Steelworkers letter to Rep. Hynes (The letter inaccurately describes the requirements of Section 1E to mean "that the parties have to bargain over safe staffing levels.") The Department should dismiss this previously rejected argument. First, collective bargaining agreements typically reflect the specific negotiating history between the parties whereby the utility and its union are free to structure their agreements as they see fit. Here both parties were aware of the requirements of Section 1E and elected to retain a number of contractual provisions according to Berkshire's substantial discretion in structuring its operations. The Department should be reluctant to alter the agreed-upon intentions of such parties. Indeed, the Department should be wary of a course that requires exhaustive review of collective bargaining agreements, a task relatively far afield from its traditional role.[8] Second, the Department should not hold that Section 1E somehow incorporates such a requirement that a specific provision ought to be included within a collective bargaining agreement to preserve management discretion. No such requirement is included within Section 1E. In fact, when the General Court has determined that specific language should be included in an agreement with a utility, it has expressly so provided. Cf. G.L. c. 164, §94B (long-term utility contracts for services

[8] The Department has recognized this same point in response to certain arguments raised by a labor group in D.T.E. 99-84-B. In a motion for clarification, the Utility Workers Union of America ("UWUA") requested that the Department include specific provisions within the Guidelines in the event that a collective bargaining agreement did not specifically mention Section 1E. Id. at 11 - 12. The Department appropriately denied that motion and confirmed that this issue would be determined on a case-by-case basis. Id. at 12-13.

from affiliates are void unless either approved by the Department or such contracts "include a provision subjecting compensation to be paid thereunder to review and determination" in a rate case (emphasis added)). The General Court did not mandate such a provision in Section 1E and the Department should not rewrite this section by accepting the Attorney General's argument.

D. BERKSHIRE'S CORPORATE RESTRUCTURING HAS BEEN REVIEWED BY THE DEPARTMENT IN TERMS OF SERVICE QUALITY

In November 1997, Berkshire operated as a single entity. Berkshire had no affiliates and its common shares were publicly traded. Berkshire engaged in several non-regulated businesses through "divisions" within the Company.

In response to initiatives from the Department and the General Court with respect to the merits of greater "legal" separation between public utilities such as Berkshire and competitive "affiliates," on June 23, 1998, Berkshire petitioned the Department for approval of a "Reorganization Plan." See The Berkshire Gas Company, D.T.E. 98-61/87 (1998). The Reorganization Plan provided for the establishment of a new holding company (Berkshire Energy Resources) to directly own the common stock of Berkshire. Berkshire also proposed that its "retail propane operations and energy marketing activities . . . [then] performed through divisions of Berkshire, . . . be transferred to new subsidiaries [of Berkshire Energy Resources]." Id. at 4. An evidentiary hearing on this request was held on September 29, 1998. Id. at 2.

The Department reviewed the Reorganization Plan pursuant to the "public interest" standard of G.L. c. 164, §96, including the factors set forth in Mergers and Acquisitions, D.T.E. 93-167-A (1994). One such factor expressly examined by the Department was the effect of the Reorganization Plan on service quality. Id. at 2, 11-

12. Berkshire presented substantial evidence that its regulated utility operation was to be "central" to the new holding company and that the Company would "continue its commitment to customer service and relevant operating and safety requirements." Id. at 11. Berkshire explained that the reorganization would not adversely affect quality of service. Indeed, Berkshire explained that the Reorganization Plan might actually enhance service quality by avoiding the prospect of "the diversion of the regulated utility's resources" to unregulated business resulting in a degradation of service quality. Id. Berkshire also presented testimony as to its continuing incentive to maintain high standards in its service quality, including the requirements of performance based rates.

In approving the Reorganization Plan and the related transfer of operations away from Berkshire to non-regulated affiliates, the Department found that its authority pursuant to G.L. c. 164, §93 provided "adequate protection from degradation in the quality of service of Berkshire." Id. at 12. The Department went on to the note the expected (and subsequently implemented) monitoring of quality of service under performance-based ratemaking "will protect customers from a degradation in the quality of service."

In sum, the Department's express findings in D.T.E. 98-61/87 fully satisfy the requirements of Section 1E with respect to any employee restructuring associated with the reorganization of non-regulated operations such as retail propane and services. The Department expressly approved the transfer of these operations to non-regulated affiliates "following an evidentiary hearing" and after finding that the Reorganization Plan would not degrade service quality. Accordingly, the Company would be proper in also relying upon this decision in confirming its compliance with the requirements of Section

1E at least with respect to any staffing changes associated with the Reorganization Plan.

E. CONCLUSION

Berkshire has demonstrated that its union regulated utility staffing levels are higher than both the November 1997 date referenced in Section 1E and the date of its "test year" applied in determining utility staffing levels in the Company's recent rate case. These facts alone are sufficient to determine Berkshire's compliance with Section 1E and for the Department to find that there is no basis for the Attorney General's Motion for Reconsideration. Nevertheless, beyond this factor, Berkshire may properly rely upon the substantial flexibility provided within its recent collective bargaining agreement in terms of any restructuring of its work force. Finally, Berkshire may, if necessary, rely upon the extensive review of its corporate restructuring undertaken in 1998 in connection with the corporate separation of its non-utility businesses. In sum, these additional bases provide justification for prior union staff reductions or staff restructurings undertaken by Berkshire in the future that reduce Company union staffing and demonstrate that, in the event of such a change, Berkshire will remain in full compliance with the requirements of Section 1E.

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